

NORTH DAKOTA DEFENDER

The Newsletter of the North Dakota Commission on Legal Counsel for Indigents

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Tenth Edition

The Commission

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Upcoming Meetings and Events

June 3, 2008 - Commission Meeting
Vogel Law Firm, Fargo
June 11-13, 2008 - SBAND Annual Meeting
Alerus Center, Grand Forks
Sept. 11-12, 2008 - Bench and Bar Seminar
Doublewood, Bismarck
Oct. 17, 2008 - UND Homecoming Seminar
Alerus Center, Grand Forks
July 16-17, 2009 - Indigent Defense Seminar
Location to be announced

EYEWITNESS IDENTIFICATION

Eyewitness identification of a suspect accused of a crime is an area of the law being subjected to more and more criticism. Recently one of our contract attorneys, Ross Brandborg from Fargo, had the opportunity to attend a National Association of Criminal Defense Attorney seminar entitled "Litigating Eyewitness Identification Cases in the 21st Century" in New York City. NACDL teamed up with the Innocence Project of NYU Law School and other agencies to educate the attendees on this fascinating topic. Over the past 30 years, unprecedented social science research has demonstrated the fragility of eyewitness evidence. Recently, there have been concerted efforts towards policy reforms to improve identification procedures on the basis of this scientific research. Seminar material and speakers highlighted the fact that mistaken identifications lead to wrongful convictions; for example, of 207 people exonerated through DNA evidence, more than 75% had been misidentified by a witness. Ross can be contacted for seminar information should one of our agency attorneys have a question.

The Innocence Project has tentatively agreed to participate in the annual Bench and Bar seminar to be held on September 11, 2008, at the Doublewood in Bismarck (please save the dates). This seminar will be strictly geared toward the practice of criminal law.

An excellent documentary available on Netflix and other movie rental companies is an independent film directed by Jessica Sanders entitled "After Innocence." It demonstrates the devastation to the person wrongfully convicted due to erroneous eyewitness identification, and shows how slow the justice system has been to help those folks and their families. Many of the people were incarcerated for years, and have no job, money, or support system upon their release.

MULTIPLE REPRESENTATIONS - A REAL DILEMMA

Robin Huseby, Executive Director

One of the more common complaints of agency attorneys, court personnel, and administration of our agency revolve around the cases in which a defendant requests, and is granted, multiple attorneys on the same case. The issue of multiple representation is an

important issue for our agency and the court system as not only does it create delays in the proceedings, but it often times becomes very expensive. This situation occurs quite frequently and has reached, in some cases, almost unbelievable levels where we see a single indigent client who has upwards of ten attorneys being provided.

Certainly there are cases in which legitimate conflicts exist, and the attorney of record needs to withdraw. For example, attorney Jones finds out through the discovery process that a witness testifying against his client in a drug case is a client of his in another matter. Attorney Jones moves to withdraw and a new attorney needs to be appointed. Our agency is contacted by the court or lead counsel for conflict counsel. That delay and procedure is a normal part of the process. However, many times the process is manipulated by unreasonable clients. We are encountering situations when a defendant either claims the attorney of record has a conflict (which the attorney does not have) or the defendant creates a situation which is untenable for the attorney of record to remain as counsel. A classic example would be where the attorney and client disagree on a course of action, and the client files with the disciplinary board an ethical complaint against an attorney, thereby intentionally causing a conflict for the attorney and he/she withdraws from the case. Another example would be where the client refuses to cooperate with counsel to the extent that counsel cannot communicate with the client and moves to withdraw from the case.

How do these cases spiral into these situations where a client is allowed three, five, seven, or more attorneys? Let us use the above example where the client refuses to cooperate and will not communicate with counsel. The Court, not wanting the proceeding delayed, allows the withdrawal of counsel and asks our agency to appoint new indigent defense counsel. The reason this type of situation is expensive for our agency is that after the first or second attorney (if it is a public defender or contract counsel), we have to find someone on a case-by-case basis and pay the attorney separately for that case. In one instance, we had to find ten attorneys for one client on a misdemeanor matter. On another matter – a double A felony – we had a total of six attorneys appointed, with the defendant citing what I felt to be

frivolous reasons for wanting new counsel, but the situation was so unworkable that the attorney of record couldn't live with the representation as is. On a recent case that we assigned out, the client has had seven different counsel and from his correspondence with us, I won't be surprised if there will be more complaints about his new counsel. There are several other cases that the clients have had more than three attorneys appointed. In the three specifically cited cases above, our agency had moved to have the Court find the defendant "pro-se"; that is, that by his/her own actions of creating an impossible situation, he/she in essence had "waived" his/her right to counsel and should represent him/herself. The Court will not do that unless the Court has advised the defendant that continued behavior of being uncooperative will result in such a finding.

One question I ask myself in regards to this situation about multiple representations is "would this happen if a client was paying for his/her attorney?" Clearly there are times when a client fires his/her privately retained attorney, and hires another one. Rarely, however, do you see a client demanding five, six, or seven different attorneys. The simple truth of the matter is, the client would not be able to afford it. The next logical question is, in my opinion, can WE afford it, or, more importantly, should we have to afford it? Having a right to an indigent attorney does not equate into having a right to choose which attorney will be appointed.

I believe a step in the right direction is to initiate steps to let the clients know, from the attorneys, Court, and our agency, that the attorney appointed is their attorney unless there is a legitimate conflict. If the client becomes unreasonable and is making it so that multiple attorneys are being appointed for frivolous reasons, the situation may evolve to where the client is deemed to be representing him/herself.

Certainly we want to provide competent and zealous legal representation, at a reasonable cost, to indigent clients. We also want the client and the attorney to be reasonably compatible. For that reason, we do grant many requests for substitutions of counsel for legitimate purposes. However, the problems we have regarding multiple representations stem from these extreme situations referenced above.

When is enough, “enough”? Are we obliged (or should we be obligated) to continue to appoint counsel after three, four, five, six attorneys? It is a very interesting and complex problem, and one we will continue to work on with the Judges and court administration. They have been very receptive to our discussions and interested in helping us come up with some solutions.

FEATURED CONTRACTOR

- Phyllis Ratcliffe -

A 50 year milestone!

Phyllis Ratcliffe is a sole practitioner whose office is located in Cooperstown, ND. She is a graduate of the University of North Dakota School of Law, and was admitted to practice law in North Dakota in 1958.

Phyllis states that “being a female lawyer today is not so unusual; but when I was admitted to the North Dakota bar, I was the only woman candidate. In fact, I was the only woman in my senior law school graduating class from UND.”

Following graduation, Phyllis was associated for two years with attorney John O. Garaas in Watford City, North Dakota. After his appointment as United States Attorney, she remained in Watford City, North Dakota and after a short partnership, she practiced for a number of years as a sole practitioner.

In 1966, Phyllis successfully ran against a former partner for the Office of State’s Attorney for McKenzie County, North Dakota. She was the first woman to be elected to the office of State’s Attorney in North Dakota.

When her husband was transferred to Bismarck, Phyllis worked for a time with the Department of Human Services, before establishing a solo practice in Grant County, North Dakota. In 1991, she left there to associate with James Wold in a law practice in Cooperstown, North Dakota. Phyllis later established a solo practice when General Wold was appointed to the federal post as Deputy Director of the POA and MIA agency.

Phyllis is married to Dr. Merrill Berg, the former president of Lake Region Community College, in Devils Lake. She has one son who is a chiropractor, and two grandchildren. Phyllis is very active in economic development in the area and other Community and Church activities.



Phyllis states that “I served over 16 years as a prosecutor but now have crossed to the other side of the isle where I am a contract indigent defense attorney. It has been an interesting epiphany to discover that not all defendants are guilty and not all law enforcement are infallible.”

During her many years practicing law in North Dakota, Phyllis has had an impact on many attorneys throughout the state. Several of them wanted to take the time to say thanks, and to let others know about Phyllis’ contributions. Robin Huseby, the Commission’s Director states: “I have known Phyllis for many years, and our paths have crossed in many different ways. She and her husband live in Cooperstown, and my husband and I farm near there, so once in a while I’ll see her at an auction sale or somewhere in the community. I was State’s Attorney in Barnes County for almost 20 years, and served as a fellow state’s attorney with her and attended many CLE events with her, as well as was adverse to her on many cases when she was defense attorney. Now Phyllis works for our agency as an indigent defense contractor. In all her roles as an advocate, whether for the state or defense, she is a consummate professional. Phyllis is very

dependable and trustworthy.”

Stutsman County State’s Attorney Fritz Fremgen notes that “Phyllis is a delight to work with and always professional. Her solid basis in the civil law gives her a broad perspective in the criminal law and ability to launch some sensible arguments based just on correlation.”

Southeast Judicial District Judge John T. Paulson states that Phyllis “is always prepared.”

Russ Myhre, a contractor in the Southeast Judicial District, has this to say: “I am so proud to have had Phyllis as an influence in my life. She mentored me when I was a young attorney, always having time to discuss legal issues with me, no matter how busy she was with her own practice, but more than that, she is a positive role model for young women within the profession. Russ noted that “when Phyllis graduated from law school, there were very few women in law, and even fewer who were active practitioners. However, Phyllis did not follow the traditional gender-based role that women were relegated to in the legal profession back when she first began practicing law. Instead, she boldly went about the practice of law, just like everyone else within the profession. The only difference was that they were primarily male. Phyllis . . . challenged conventional thinking about the role of women in law, and she did it with a dignity and a profound professionalism that not only garnered respect for her as a person, but also reflected upon the entire legal profession positively. I am so proud to have had Phyllis Ratcliff in my life as a mentor, as a personal role model, and as a friend.”

Thank you, Phyllis, for your many years of public service as a lawyer in North Dakota!

KUDOS

Congratulations to **Ben Pulkrabek**, one of the Commission’s appellate contractors. The Supreme Court reversed the district court’s judgment in State v. Kochel, 2008 ND 28, and found that the warrantless search of the defendant’s addition to his home violated the constitutional prohibition against unreasonable searches and seizures.

In R.P., 2008 ND 39, the Court held that a juvenile has a limited statutory right to consult with a parent, guardian, custodian, or legal counsel before submitting to chemical testing. A juvenile must be afforded that opportunity, as long as providing the opportunity does not materially interfere with administration of the chemical test. The Court agreed with **Justin Vinje**’s argument, that an earlier amendment to § 39-20-01 did not deprive the juvenile of the right to consult with the juvenile’s parents before submitting to chemical testing. Thank you, Justin, for working hard for juvenile rights.

In State v. Lium, 2008 ND 33, the Supreme Court held that the district court abused its discretion in denying the defendant’s motion to withdraw his Alford guilty pleas, without determining whether the defendant presented a fair and just reason for withdrawal. The Supreme Court remanded for reconsideration of the defendant’s motion. Congratulations, **Alex Reichert**, on a job well done.

Our condolences

Neil Thompson of Devils Lake died February 25, 2008 at the age of 83. He was a member of the firm of Thompson and Thompson, with his son, Scott Thompson, and had for many years provided indigent defense services in the Devils Lake area. He was well-known for his legal expertise, honesty, dedication and kindness.



We thoroughly enjoyed working with Neil, and greatly appreciate his work for this agency.

Update on Standards

At its February meeting, the Commission preliminarily approved Minimum Attorney Performance Standards in Juvenile Unruly and Delinquency Matters, and Minimum Attorney

Performance Standards in Juvenile Deprivation and Termination of Parental Rights Matters. These standards went out to interested persons to review and comment. The Commission will review all comments and decide at its next meeting whether to adopt the standards as written, or whether to adopt them in a modified version pursuant to comments received. If you would like to receive copies of these or other standards and policies when they go out for comment, please contact the Commission at jedelaney@nd.gov or 701-845-8632, to get placed on the notification list.

The Commission's adopted Guidelines, Standards and Policies can be viewed on the Commission's website: (www.nd.gov/indigents). You may also contact the Valley City office at 701-845-8632 for copies.

APPELLATE CASES

Prior to our agency assuming jurisdiction over indigent defense cases in North Dakota, the attorney handling the district court matter usually had to take on the appellate matter, too. In some cases this continuum of services worked out fine; it often makes sense for trial counsel, who knows the facts and issues the best, continue with the appeal. Problems would arise when the client wanted to raise ineffective assistance of counsel claims in post-conviction proceedings and/or the appeal. In contract areas, such as the East Central or South Central districts, the other contractors in the district could switch off those appeals, but it was a real problem for areas in which there were not enough conflict contractors to take over for the trial attorney. Also, this area of appellate work was a hot topic for our contractors as appellate work, which includes post-conviction relief, takes up huge chunks of time. If a contractor who had 250 case assignments in a year was assigned a post-conviction proceeding on a murder case, for example, that attorney might feel very overwhelmed and question whether he/she could do justice to the client's case.

In 2006 we experimented with having one part-time appellate contractor; an attorney (most often not already a contractor) committed to giving our agency so many hours a month devoted to

appellate matters. It was soon obvious that one was not enough, and we added another. We since have added a third with the third attorney taking primarily East Central appellate matters. Since the inception of creating these case-specific contracts, we have assigned to those specialty counsel and some assigned counsel over **60** appellate matters that otherwise would have had to have been handled by trial counsel. Many of these appellate matters were high impact cases due to the nature of the subject matter. We have weighed the additional cost of outsourcing these matters from trial counsel against the burden it causes those attorneys, and believe that it is best for both counsel and the client to have separate appellate counsel when there is a conflict with the trial counsel.

Even with the addition of separate, part-time appellate counsel on contract, our public defenders and contractors are still obligated to take appellate work. Unless and until we have a fully staffed "appellate division," we will not be able to take all the appellate matters out of the hands of the trial attorney. I think it is fair to say, however, that having some ability to out source these matters from the trial attorney has been of benefit to the attorneys and clients.

Rule changes . . .

There were several recent changes to the North Dakota Rules of Criminal Procedure, Rules of Civil Procedure, Rules of Evidence, and Rules of Appellate Procedure. These changes can be found on the Supreme Court website at <http://www.ndcourts.com/Court/New.htm>. Some of these changes which may be of interest to indigent defense attorneys are highlighted below:

Rule 17 of the North Dakota Rules of Criminal Procedure now clarifies that an indigent defendant need not tender the witness fee and mileage allowance when a subpoena is issued.

Rule 404 (a) of the Rules of Evidence is amended to provide that "[e]vidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule

404(a)(2), evidence of the same trait of character of the accused offered by the prosecution . . . [is admissible for the purpose of proving action in conformity therewith on a particular occasion].”

Rule 408 of the Rules of Evidence now clarifies that evidence of offers to compromise is not admissible for impeachment as a prior inconsistent statement.

Rule 4 of the North Dakota Rules of Appellate Procedure was amended to provide that “[t]he filing of a motion under N.D.R.Crim.P. 35(a) [motion to correct a sentence] does not suspend the time for filing a notice of appeal from a judgment of conviction.”

Rule 14 of the North Dakota Rules of Appellate Procedure requires that certain persons be referred to by initials, and not by name, in appellate briefs, during oral argument, and in appellate opinions.

North Dakota Rules of Court, Rule 10.1 has been amended to provide, in part, that “[a] juror may

not possess any wireless communication device during deliberations.”

Next Commission Meeting

The next Commission meeting is scheduled for June 3, 2008, in Fargo. If you have any business for the Commission, please contact the Valley City office as soon as possible to get placed on the agenda. We provide notice of the meetings to the Secretary of State’s office, and the meetings are open to the public.

Public Defender offices to open

The Commission is opening public defender offices in Bismarck (July 2008), and Fargo (November 2008). Interviews for the Bismarck Public Defender staff attorney positions will be scheduled for the later part of April or early May. Applications for Bismarck’s Administrative Assistant position are due on May 9.

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